Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate Interexchange Marketplace	)	CC Docket No. 96-61
	)	
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	
	)	

To: The Commission

PETITION FOR RECONSIDERATION AND PETITION FOR FORBEARANCE

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Bell Atlantic Mobile, Inc. hereby requests that the Commission reconsider its First Memorandum Opinion and Order on Reconsideration in this proceeding, FCC 97-269, released July 30, 1997 ("Order"). To the extent the Order imposes the "rate integration" provision of the Communications Act, Section 254(g), on providers of commercial mobile radio services (CMRS), it is unlawful on multiple grounds, and must be set aside.

Section 254(g) does not mandate integration of CMRS rates. In any event, forbearance from Section 254(g)'s application to CMRS is required, because the Commission has already made each of the findings for statutory forbearance, and when those findings have been made, the Commission must forbear. The Commission must therefore modify its rate integration rules to state that they do not apply to the provision of CMRS.

SUMMARY

In a subordinate clause of one sentence of one paragraph of a reconsideration order which focused on different issues, the Commission has imposed unprecedented "rate integration" obligations on providers of mobile services which will potentially require restructuring of the CMRS industry. This casual and ill-considered action is unlawful, and must be set aside, for five independent reasons.

1. The Order violated basic precepts of notice and comment rulemaking by extending rate integration to wireless carriers, even though the Commission did not provide notice that this issue was within the scope of this proceeding. The Order was a sudden, radical and unexplained shift in rate integration policy.

2. The Commission imposed this major new obligation without any statutory or record basis for doing so. Section 254 does not require CMRS rate integration, and its legislative history shows no intent by Congress to expand rate integration in that way. Moreover, nothing in the record supplies the requisite grounds for evaluating the public interest benefits and harms of that new course. The Order is the epitome of arbitrary and capricious agency action.

3. The Order's unexplained application of rate integration to the wireless industry conflicts with the Commission's policies to encourage wireless competition and remove regulation. The Order is particularly pernicious because it takes the Commission back into the very area that both it and Congress determined it should not tread -- CMRS rate regulation. The Order unlawfully fails even to address this serious conflict, let alone attempt to resolve it.

4. The Order's cursory treatment of CMRS fails to give legally required notice to wireless carriers as to how they are to comply with this new obligation. It fails to recognize the radical differences in the way wireless and landline interstate services are provided, and provides no explanation to the wireless industry of what its actual obligations are.

5. Extension of rate integration to the wireless industry is anticompetitive. It will potentially eliminate pro-competitive wireless calling plans that consumers benefit from and have come to expect, distort competition by forcing certain prices to be arbitrarily leveled, impair new CMRS entrants in violation of Commission policy encouraging new competition, harm the public interest benefits of customer-responsive pricing, and impair carriers' fiduciary obligations.

The Order must accordingly be set aside to the extent it extends rate integration to wireless carriers. In addition, the Order cannot simply be modified and still impose CMRS rate integration, because there would still be no record on which to base that action or to determine how rate integration would work. Instead, the Commission should resolve this matter by determining (1) that Section 254(g) does not mandate CMRS rate integration, or (2) that Section 10 of the Act requires it to forbear from grafting that new regime of rate regulation onto the wireless industry. The Commission has previously made all of the findings which require it to do just that. This solution will enable the Commission to discharge its responsibilities under Section 10, Section 254, and the deregulatory federal paradigm for the wireless industry.

I. CMRS RATE INTEGRATION WAS IMPOSED WITHOUT LAWFUL NOTICE.

The Commission initiated this proceeding through a Notice of Proposed Rulemaking in July 1996.[1] The Notice's stated purpose was "to promote competition by reducing or eliminating existing regulations that may no longer be in the public interest in the increasingly competitive interexchange marketplace." The Notice's long discussion of competition in that "marketplace" concerned only the landline interexchange market occupied by AT&T, MCI, and other landline carriers. It proposed changes to many of its rules governing the interexchange market, including rules to implement new Section 254(g) of the Act, adopted as part of the Telecommunications Act of 1996, which imposes "rate integration" and "rate averaging" requirements on interstate interexchange carriers.

The Notice did not, however, engage in a similar evaluation of competitive conditions in the CMRS market or discuss rule changes for mobile services or carriers. To the contrary, the Notice gave every indication that it was not to apply to CMRS. For example:

> -- The Notice proposed to "forbear" from tariffing interstate interexchange services. This proposal would have made no sense if the Commission had envisioned mobile services as within the scope of the rulemaking, because the Commission had already detariffed mobile services back in 1994.[2]

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[1]CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996).

[2]Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994).

-- The Notice proposed to permit "bundling" of CPE and interstate interexchange services. Again, this made sense only if the scope of the Notice did not include CMRS, because CMRS providers were long ago permitted to bundle CPE and services.[3]

The Commission later issued two orders implementing the Notice's proposals for changes in regulation of the landline long distance industry and adopting a rate integration/rate averaging rule (47 CFR § 64.1801). Both were also silent on whether or how rate integration would regulate CMRS providers' rates.[4] The reconsideration Order suddenly addresses CMRS almost in passing:

> Thus, while the rate integration provision applies to all interstate interexchange telecommunication services and therefore requires CMRS providers to provide the interstate interexchange CMRS service on an integrated basis in all their states, it does not require a carrier to offer interexchange CMRS service and other interstate interexchange services under one rate schedule. (at ¶ 18.)

Such casual imposition of a major new obligation on the industry, without prior indication that it was to be addressed, violates key principles of agency rulemaking.[5] The fundamental goal of the "notice and comment" process in the Administrative Procedure Act which governs this docket is to afford interested parties notice of the issues to be addressed, and the opportunity to supply the agency with comments, arguments, and other information on which a reasoned

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[3]Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Report and Order, 7 FCC Rcd 4028 (1992).

[4]CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1996); Second Report and Order, FCC 96-424 (October 31, 1996).

[5]Even if the offhanded manner in which the Order addresses CMRS resulted from the fact that it was not written by the Bureau with lead responsibility for CMRS oversight and regulation (see 47 CFR § 0.131), this does not excuse lack of adequate notice.

decision can be made. Here, however, there was no opportunity to do so, because the Notice did not raise the issue of CMRS rate integration at all.[6]

The Commission's action here is strikingly similar to its unlawful action in adopting rules for cellular unserved area applications. In McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993), the Court struck down part of the agency's order because it had failed to provide adequate notice to applicants. The Commission unsuccessfully claimed that applicants were put on notice by a footnote in the order, but the Court refused to allow notice to be placed on "that obscurely placed nugget":

> The much-heralded footnote thus does not, in the final analysis, serve as the beacon the Commission would have us think, illuminating the petitioners' treacherous path through the text and guiding them safely to the conclusion that the Commission now urges.

990 F.2d at 1362. Here as well, the Notice in this docket referred to CMRS only once and in a footnote, and even then did not mention it in the context of discussing possible imposition of rate integration to CMRS. Notice at ¶ 52. The "notice" here was even less than that what was invalidated in McElroy.[7]

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[6]The courts have reversed Commission rulemaking actions for lack of adequate notice where the Commission mentioned the scope of its action but did so in an unclear manner. E.g., Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987) (vacating rulemaking order for lack of requisite notice caused by ambiguous language). Here the Order does even less.

[7]These and other procedural infirmities in the Commission's course must also invalidate any effort to impose rate "averaging" requirements on CMRS providers.

II. THERE IS NO RECORD BASIS FOR CMRS RATE REGULATION.

In its one passing reference to CMRS, the Order fails to point to any record information that could support it, and in fact there is none. The record supplies no information on which the Commission could form a reasoned basis for whether rate integration should apply to CMRS, what wireless services would be covered, or what constitutes "interstate interexchange" CMRS traffic. Because the Notice did not address CMRS, there is no record information as to the pro-competitive or anticompetitive effects of rate integration, why Section 254(g) might or might not apply to CMRS, or whether forbearance would be appropriate. Nor is there any evidence to show why the current pricing of mobile services disadvantages or harms subscribers who reside in Alaska, Hawaii, or other offshore points who are the primary intended beneficiaries of rate integration.

In fact, application of rate integration (or rate averaging) to CMRS providers is not compelled by Section 254(g). To the contrary, legislative history shows that Congress did not intend to reverse course, by placing an industry which had just been removed from rate regulation back under such intrusive government intervention. For example, the Conference Report states that Section 254(g) was expressly intended to "continue" Commission rate integration policies.[8]

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[8]Joint Explanatory Statement, S. Conf. Rep. No. 104-104, 104th Cong., 2d Sess. 132 (1996): "New section 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas thoughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers."

But there was not CMRS rate integration policy to "continue."

The Commission's own prior actions in this docket undermine the reconsideration Order as well. In implementing Section 254(g), the Commission stated, "We conclude that Congress intended the states to play an active role in enforcing Section 254(g) with respect to intrastate geographic rate averaging. . . ."[9] But the states had just been preempted -- by the Commission itself -- from playing any role in rate regulation.[10] The Commission did not find this inconsistent because it was assuming (then) that Section 254(g) had no bearing on CMRS rates. Now, it has reversed position -- without even acknowledging having done so. It is hard to conceive of a more arbitrary and capricious agency action.

Just as an agency must provide fair notice of the scope of a rulemaking, it also must base its decision on a cogent explanation of why the statute grants it proper authority for the action it is taking, and that the action is supported by the administrative record. The decision here has no such statutory or record basis, let alone an adequate one.[11] For this reason alone, it cannot stand.

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[9]CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 at ¶46 (1996).

[10]See, e.g., In Re Petition of Connecticut Dep't of Public Utility Control, Report and Order, 10 FCC Rcd 7025 (1995), aff'd, 78 F.3d 842 (3d Cir. 1996). Given that the Commission had recently decided to forbear from federal rate regulation, and also to preempt all state rate regulation, and was defending that decision in Third Circuit, it makes no sense to assume that Congress intended to reverse direction so completely but said nothing about doing so. Yet that is the logical result of the Order's position.

[11]Courts have repeatedly reversed Commission actions which are not supported by an adequate record. For example, the D.C. Circuit recently vacated portions of the new regulations for payphone services as arbitrary and capricious because they lacked foundation in the record, and had not been explained. Illinois Public

III. WIRELESS RATE INTEGRATION UNDERMINES THE FEDERAL PARADIGM FOR CMRS DEREGULATION.

In its 1993 amendments to the Communications Act, Congress adopted a new, deregulatory paradigm for commercial mobile services, which was to be distinct from regulation of landline services.[12] Congress expressly found that regulation can undermine the public interest, by skewing and impairing competition. Minimal regulation, it found, was in the public interest because it would promote vigorous competition, enhance service and stimulate innovation. Any regulation of the CMRS industry must meet a demonstrated need.[13]

In its subsequent decisions on CMRS regulation, the Commission has repeatedly found that CMRS regulation must be clearly justified by evidence that government intervention was needed, and must also be narrowly written to solve an identified problem in the competitive CMRS market: "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut

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Telecommunications Ass'n v. FCC, No. 96-1384 (D.C. Cir. 1997). See also Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) (FCC must supply and articulate a reasoned basis for its action). Here the record and rationale for CMRS rate integration is not only inadequate; it is non-existent.

[12]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993).

[13]See H. Rep. Rep. No. 103-111, 103d Cong., 1st Sess. 259-60 (1993); H. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494 (1993).

need."[14] For example, in revising its rule governing resale of CMRS (47 CFR § 20.12), the Commission "narrowly tailored" the rule to address the problem identified in the record, and noted, "The resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted."[15]

The Order's casual direction to CMRS carriers to integrate their "interstate interexchange rates" cuts against this Congressional mandate and Commission policy. The problem is not merely that it subjects CMRS providers to new regulation without any basis for doing so, let alone the "compelling" need required by the new paradigm. In addition, the Order also imposes regulation of the worst and most intrusive, market-distorting kind -- price regulation -- without so much as an acknowledgement that price regulation was exactly what both Congress and the Commission had declared was not necessary and was affirmatively harmful to the public interest. The Order is oblivious to this fundamental flaw.

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[14]In Re Petition of the Connecticut Dep't of Public Utility Control, Report and Order, 10 FCC Rcd 7025, 7031 (1995), *aff'd*, 78 F.3d 842 (3d Cir. 1996). In many other decisions, the Commission has expressed its policy of not imposing CMRS regulation except where clearly warranted. See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994) "We establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees"); Third Report and Order, 9 FCC Rcd 7988, 8002 (1994) (CMRS regulations should "ensure that the marketplace -- not the regulatory arena -- shapes the development and delivery of mobile services.").

[15]Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶ 14.

It is no answer to point to Section 254(g). Nowhere in that section, or in its legislative history, did Congress suggest that it intended to reverse the fundamental deregulatory policies for CMRS that it had adopted in the 1993 amendments. To the contrary, Congress was careful to include provisions in the 1996 Act which guarded against implied repeal. See, e.g., Section 601(c). Given the radical reversal of course which CMRS rate integration entails, had Congress intended this result, it would have at least mentioned it, but did not.

IV. THE ORDER UNLAWFULLY FAILS TO DEFINE CMRS CARRIERS' RATE INTEGRATION OBLIGATIONS.

The concept of rate integration is premised on a set of discrete, identifiable interstate interexchange services which exist apart from local exchange services. Wireless services, however, transcend "exchange" boundaries and thus cannot be categorized as "interexchange" or "local exchange." The Commission has encouraged CMRS providers to offer multi-state or even national services, and many CMRS carriers do so. Consistent with the Commission's goal of wide-area services, CMRS carriers have introduced end-to-end services that allow the customers to make calls without regard to "exchanges." Through roaming or other intercarrier arrangements with other carriers, carriers can provide the public with seamless wide-area services. This has been precisely the result the Commission sought: to "ensure that the marketplace -- not the regulatory arena -- shapes the

development and delivery of mobile services."[16]

Now, CMRS carriers are apparently required to "integrate" their "interstate interexchange CMRS" service. But the Order fails to identify what that service is. Bell Atlantic Mobile, for example, frequently provides interstate CMRS service, for example, the Washington, D.C. area. It also provides regional service, for example along the Atlantic seaboard. In every market, Bell Atlantic Mobile has a variety of pricing plans that respond to local customer demands for varied pricing options, service features, and geographic calling patterns. Some plans allow customers to call anywhere in the nation at the same rate or at their regular airtime rates, with no additional charge for such interstate CMRS service.

Which if any of these rates are subject to rate integration? How would rate integration apply to whatever rates are in fact covered? How would it apply to roaming rates? Are wireless carriers required to unbundle price plans to separate out and separately bill a nationally "integrated" interstate charge? If they already include a separate interstate charge instead of bundling it, given that the total price to customers is the same, why should the result be legally different? The Order supplies absolutely no guidance or information. An agency must apprise regulated entities with fair notice of their obligations so that entities can have the requisite certainty of what is expected and can comply with those obligations. The Order clearly violates that well-established principle.

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[16]GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd at 8002 (1994).

V. WIRELESS RATE INTEGRATION IS ANTI-COMPETITIVE.

The Order's failings are not confined to its violation of Congressional and Commission deregulatory policies for CMRS. It creates serious and immediate problems that, if not immediately addressed, will undermine the pro-consumer benefits of wireless competition which Congress and the FCC have stated is their mutual goal.

First, by requiring carriers to "integrate" their rates, the Order appears to force elimination of price competition that has evolved among CMRS providers. Competing cellular, PCS, SMR and paging carriers price their services in direct response to competitive pressures from each other. Decisions as to whether to have a separate charge for some types of interstate calls, to bundle any charge into a higher air-time rate for certain calls, or to add no charge at all, are driven by local competitive factors. These competitive forces obviously differ across the country. The Commission has, moreover, acknowledged that wireless competition (unlike landline interexchange service) is primarily local, not national. The Order, however, appears to require a wireless competitor in one city to price its "interstate interexchange" services (whatever those are) identically with the rates in another part of the country that the carrier may happen to serve -- even if that market is 3,000 miles away and is entirely different in size and competitive structure. Aside from the fact that this makes no sense, it is clearly anti-competitive, because it discourages carriers from the very types of local

competitive responses which lead to lower rates for wireless consumers.[17]

Second, rate integration will frustrate the ability of new entrants into the CMRS market to compete by offering variable pricing to capture existing carriers' customers. As one new CMRS entrant has explained in supporting a stay of the Order, not only will rate integration impair its own efforts to compete, but will hurt the very subscribers that rate integration was designed to benefit: "Especially as PCS operators are now deploying and building out competitive services in many areas of the country, a regulatory intrusion into the market-based process of wireless pricing will seriously disincent operators from building out rural markets."[18]

Third, as the Commission is well aware, wireless carriers often operate through partnerships in which many independent entities hold ownership interests. This is true both in cellular and PCS. Bell Atlantic Mobile, for example, operates three of its five largest markets through partnerships in which independent companies hold ownership interests. The managing partners of these licensee partnerships owe fiduciary duties to their partners to take actions that

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[17]The Commission has championed the role of PCS and other new CMRS competitors in bringing down the rates of cellular services in specific cities. Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Second Report, released March 25, 1997, at 42-46. Rate integration would reverse this pro-competitive trend by depriving customers of the benefits of this lower pricing.

[18]Comments of Omnipoint Communications, Inc. in Support of Motion for Stay of PCS PrimeCo Personal Communications, LP, CC Docket No. 96-61, filed September 29, 1997, at 4.

will maximize the success of the partnership. Rate integration, however, would appear to require a licensee in one market to price its services not to maximize its market position, but to match what another partnership with different partners might charge in another market. Such rate leveling could thus disrupt existing partnership operating arrangements and conflict with the fiduciary duties of the managing partner. Carriers would potentially be forced to restructure their operations and partnerships in order to ensure that they can comply with whatever rate integration requirements are adopted consistent with legal duties owed to their partners.

These problems were, of course, not addressed by the Order. They must be resolved were the Commission to consider application of Section 254(g). As discussed above, however, the Commission can properly determine that Section 254(g) does not require CMRS providers to integrate their interstate rates. In any event, as discussed below, the Commission must forbear from imposing this new form of rate regulation on CMRS.

VI. BECAUSE THE FCC HAS ALREADY MADE THE FORBEARANCE FINDINGS AS TO CMRS RATE REGULATION, FORBEARANCE FROM CMRS RATE INTEGRATION IS REQUIRED BY LAW.

Even if Section 254 could be read as reaching CMRS, new Section 10 of the Communications Act, which was also added by the 1996 Act, requires the Commission to forbear from so applying it. Section 10 provides in pertinent part:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or

> telecommunications service, or class of telecommunications carriers or telecommunications services, in any of some of its or their geographic markets, if the Commission determines that --
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a). Section 10(a) "*requires* the Commission to forbear from applying any provision of the Communications Act or from applying any of its regulations" if the three-part test for forbearance is satisfied. H.R. Rep. No. 104-458 (emphasis added).

While Section 10 authorizes parties to petition for forbearance, the Commission need not await such a petition before determining whether it must forbear, but may do so as part of a rulemaking. Moreover, the Commission has already granted forbearance in part from Section 254 in this very proceeding, without a formal petition.[19] Bell Atlantic Mobile's Petition for Forbearance in any event provides a procedural vehicle to apply Section 10. It also triggers the

[19]CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 at ¶ 27 (1996) ("We forbear from applying Section 254(g) to the extent necessary to permit carriers to depart from geographic rate averaging to offer contract tariffs . . . .").

statutorily-mandated time frame for deciding whether or to what extent to forbear. Given the urgent problems outlined above, and the uncertainty generated by the Order, prompt action by a date certain is in the public interest.

The above discussion, and the pleadings filed with the Commission opposing the reconsideration Order, demonstrate why extension of rate integration to wireless services is "not necessary" to ensure that CMRS practices are just and reasonable, or to ensure that consumers are protected. To the contrary, they explain why rate integration would harm consumers.[20] Because of the distinct technical and operational realities as to how CMRS is provided, rate integration is simply unworkable and in any event would not protect customers.[21]

For the same reasons, forbearance would also be "consistent with the public interest," thus meeting the other test of Section 10, because Congress and the Commission have both found that it is in the public interest to refrain from regulating CMRS, unless intervention is clearly necessary, and that is the case

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[20]Other parties have recently advised the Commission of the anticompetitive, anti-consumer effects which could result from broad application of rate integration to CMRS, in supporting PrimeCo's motion for stay of the Order. Comments of Comcast Cellular Communications, Inc., Omnipoint Communications, BellSouth Corporation, Cellular Telecommunications Industry Ass'n, and Southwestern Bell Mobile Systems (all filed September 29, 1997). The only two parties which opposed Primeco's stay did not, in contrast, show why extending rate integration would serve the public interest.

[21]The CMRS industry's current rate structure in fact appears to benefit customers in non-contiguous locations. Unlike landline IXCs, which impose higher rates for geographically more distant landline long distance calls, BAM and many other carriers have non-geographically sensitive rate plans. Under these plans, customers calling Alaska or Hawaii from the contiguous U.S. would not pay a higher rate than if they called other locations in the lower 48 states.

here. Under the federal regime for CMRS regulation, clear evidence of the need for government intervention is required before new rules are to be imposed on CMRS. Congress expressly found that regulation (and in particular the economic, price regulation involved in rate integration) undermine the public interest by distorting and impairing competition. Minimal regulation, it found, was in the public interest because it would promote vigorous competition, enhance service and stimulate innovation. And the Commission has repeatedly found that CMRS regulation must be clearly justified by evidence that government intervention was needed, and must also be narrowly written to solve an identified problem in the competitive CMRS market: "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need."[22]

The Commission need not, however, prolong this proceeding by conducting a fresh examination of the forbearance tests. It has already considered each of those tests with regard to CMRS rate regulation, and has found that they are all met.

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[22]In Re Petition of the Connecticut Dep't of Public Utility Control, Report and Order, 10 FCC Rcd 7025, 7031 (1995), *aff'd*, 78 F.3d 842 (3d Cir. 1996). In many other decisions, the Commission has expressed its policy of not imposing CMRS regulation except where clearly warranted. See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994) "We establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees"); Third Report and Order, 9 FCC Rcd 7988, 8002 (1994) (CMRS regulations should "ensure that the marketplace -- not the regulatory arena -- shapes the development and delivery of mobile services.").

Section 10 incorporates the same tests for forbearance which are included in Section 332 of the Act. Section 332, as amended by Congress in 1993, empowered the Commission to forbear from enforcing most provisions of Title II when enforcement was "not necessary" to ensure rates or practices were just and reasonable, were "not necessary for the protection of consumers," and was "consistent with the public interest." 47 U.S.C. § 332(c)(1)(A). In its landmark proceeding to implement Section 332, the Commission applied that provision to forbear from enforcing Sections 203, 204, 205, 211, 212 and 214.[23]

Most critically, the Commission expressly found that regulation of rates was not necessary to protect against unlawful rates or practices and was consistent with the public interest.[24] The Commission went on to find that rate regulation through tariffing or other mechanisms was affirmatively harmful to competition and identified numerous other bases for forbearing from rate regulation.

Rate "integration" is simply a form of rate "regulation." It means government-imposed pricing standards that forcibly alter the rates that carriers would charge under competitive, free-market conditions. The same findings that the Commission already made as to why it should forbear from rate regulation (and why it preempted the states from engaging in rate regulation themselves) are equally applicable to rate integration.

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[23]Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1463-81 (1994).

[24]Id., 9 FCC Rcd at 1479.

The only differences between Section 332(c)(1)(A) and new Section 10 also confirm that the Commission must forbear from enforcing Section 254(g) against CMRS. Section 10 is even broader, because it permits forbearance from nearly all provisions of the Act. Moreover, it requires forbearance when the tests are met (while Section 332(c)(1)(A) merely authorizes it).

Given the Commission's own forbearance decisions, it cannot reverse course and declare that this new (and particularly intrusive and anticompetitive) version of rate regulation must displace wireless carriers' market-driven practices. The Commission has found in other proceedings that the deregulatory paradigm for CMRS is promoting competition and driving down rates. There is no reason, in the current record or outside of it, why CMRS consumers would conceivably be served by having the federal government dictate wireless service prices.

CONCLUSION

The Commission's Order extending rate integration to wireless carriers is procedurally defective as well as wrong on the merits. The Commission should vacate the Order in this regard. It should determine that Section 254(g) does not require rate integration to be extended in this manner. Alternatively, it must forbear from enforcing that rate regime against CMRS.

Respectfully submitted,

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